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Supreme Court, U.S.
FILED
NOV 16 1994
OFFICE OF THE CLERK

No. 94-804

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SPYREDON VELENTZAS,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of July, one thousand nine hundred and ninety-four.

Present:

Honorable Wilfred Feinberg,
Honorable Ralph K. Winter,
Honorable George C. Pratt,

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

O R D E R

##92-1634, 93-1117, 93-1409

JAMES NICOLAPOLOUS; THEODORE POLATSIDIS; FOTIS HALKIS; DIMITRIOS VELENTZAS; STAVROS ORKOPOULOS; DIMITRIOS KARYTINOS and KOSTAS GIANNIKARIS,

Defendants,

MICHAEL GRILLO; PETER DRAKOULIS and SPYREDON VELENTZAS,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Michael Grillo, Spyredon Velentzas, and Peter Drakoulis appeal from their convictions by jury before Judge Hurley. Grillo, Velentzas, and Drakoulis were convicted of RICO, RICO conspiracy, gambling, and loansharking offenses in connection with their operation of an illegal gambling enterprise based in Astoria, Queens. In an opinion filed this day, we explain our reasons for rejecting appellant Velentzas's argument that the conditional disclosure of certain material

ruled by the district court to be within the ambit of 18 U.S.C. § 3500 requires the reversal of his conviction. In this order, we address the appellants' remaining contentions. Finding no merit in appellants' arguments, we affirm.

I. Appeal of Michael Grillo

Grillo was convicted on six counts of a substantive RICO offense in violation of 18 U.S.C. § 1962(c), conspiracy to commit a RICO offense in violation of 18 U.S.C. § 1962(d), conspiracy to collect unlawful debts in violation of 18 U.S.C. § 1962(d), conducting an illegal gambling business in violation of 18 U.S.C. § 1955, conspiracy to make extortionate extensions of credit in violation of 18 U.S.C. § 892, and conspiracy to use extortionate means to collect and attempt to collect extensions of credit in violation of 18 U.S.C. § 894. Grillo was sentenced principally to 46 months imprisonment. He raises two issues

on appeal.

A. Due Process Right to Evidentiary Hearing on Voice Identification

Grillo first argues that his right to due process was violated by the district court's refusal to grant him an evidentiary hearing outside the presence of the jury to test the accuracy of the government witnesses' attributions to him of statements intercepted by the government's wiretap. We disagree.

In Watkins v. Sowders, 449 U.S. 341 (1981), the Supreme Court stated that in certain unspecified circumstances, it might violate due process to not hold an evidentiary hearing to determine whether the eyewitness identification procedures used in the case were suggestive. Other circuits have applied this reasoning to voice identifications as well. See United States v. Alvarez, 860 F.2d 801, 810 (7th Cir. 1988) (collecting cases), cert.

denied, 490 U.S. 1051 (1989). In a decision subsequent to Watkins, we stated that the authentication of voices is similar to that of documents, and that, so long as the requirements of Fed. R. Evid. 901 are satisfied for authentication, the accuracy of the voice identification should be left to cross-examination. Brown v. Harris, 666 F.2d 782, 786 (2d Cir. 1981), cert. denied, 446 U.S. 948 (1982). However, we left open the possibility that in some circumstances a due process claim might have merit. Id. Grillo points to no case, however, in which the lack of a hearing has been held to violate due process.

In determining whether a hearing is necessary, the question is reliability. Alvarez, 860 F.2d at 810. Grillo suggests that the identification procedures used were "suggestive," yet offers no explanation of this contention beyond his

assertion that the procedures employed might have resulted in inaccuracies. The record shows that Judge Hurley listened to the government's proffer of how their witness made the voice attributions, and then concluded that the method was sufficiently reliable to allow the jury to resolve any further questions of accuracy. The government represented that its witness had based his voice identifications on the following: (1) he was alerted by agents stationed outside the wiretap location when targets of the investigation entered the building, (2) the speakers overheard on the wiretap referred to themselves by first name, (3) the speakers overheard on the wiretap responded when others said their names, and (4) he reviewed the tapes with a cooperating co-defendant to verify their accuracy. When later called as a witness, the government's witness confirmed this

representation and added that he had heard Grillo speak on five or six occasions prior to testifying. Based on these facts, there was sufficient evidence of reliability to submit the accuracy of the attributions to the jury without an evidentiary hearing.

B. Sufficiency of the Evidence

Grillo also challenges the sufficiency of the evidence on each of the six counts of conviction. Grillo's argument is meritless.

As to the loansharking and RICO convictions, Grillo argues that there was "no live witness testimony that Grillo had ever threatened anyone with harm in an effort to collect his money, nor was there any proof about a reputation for violence or a reputation for being associated with some organized crime group." Brief for Defendant-Appellant Michael Grillo at 24 (emphasis added). Grillo's argument,

however, ignores the abundant evidence on the government's tape recordings in which Grillo speaks in detail of his violent plans for his delinquent debtors, attests to his capability for violence, and indicates his participation in the Velentzas crime group. While Grillo is correct that there was no direct evidence of specific threats to debtors, the loansharking counts he was convicted of (counts 8 and 9) charge him with conspiracy to use extortionate means to make and collect extensions of credit. The tapes clearly show that Grillo agreed to do this.

Grillo's argument that he could not be convicted on the gambling count (count 4) and the second RICO conspiracy count (count 3) because there was no evidence that his loans were made in connection with any gambling ignores the strong circumstantial evidence that Grillo knew

his loans were being used to gamble. Grillo repeatedly extended loans to players of the barbut games at the location where the games took place, and was introduced on the site of the gambling to players of the games in need of loans as a person willing to lend money. In such circumstances, the jury could easily infer that Grillo knew his loans were being used for gambling.

II. Appeal of Spyredon Velentzas

Velentzas was convicted on twelve counts of a substantive RICO offense in violation of 18 U.S.C. § 1962(c), conspiracy to commit a RICO offense in violation of 18 U.S.C. § 1962(d), conspiracy to collect unlawful debts in violation of 18 U.S.C. § 1962(d), two counts of conducting an illegal gambling business in violation of 18 U.S.C. § 1955, interstate transportation in aid of a racketeering enterprise in violation of 18

U.S.C. § 1952, interstate transportation of wagering paraphernalia in violation of 18 U.S.C. § 1953, conspiracy to make extortionate extensions of credit in violation of 18 U.S.C. § 892, conspiracy to use extortionate means to collect and attempt to collect extensions of credit in violation of 18 U.S.C. § 894, conspiracy to murder Sorecho Nalo in connection with a racketeering enterprise in violation of 18 U.S.C. § 1952B(a)(5), murder of Nalo in connection with a racketeering enterprise in violation of 18 U.S.C. § 1952B(a)(1), and conspiracy to defraud the United States in violation of 18 U.S.C. § 371. The judgment of conviction on all twelve counts was entered at the conclusion of a second trial, which occurred after the jury at Velentzas's first trial deadlocked on charges that he conspired to and did murder Nalo. At the second trial, Velentzas was convicted on these counts as

well. Velentzas was then sentenced principally to life imprisonment. He raises two issues on appeal, one of which we address in this order, and one of which, as noted above, we address in an opinion filed this day.

A. Admissibility of Ferro's Testimony

Velentzas challenges Judge Hurley's exclusion of the proffered testimony of Nalo's former wife, Vincenza Ferro, that her husband told her that "there is a fat f-ing Italian looking to kill me." (Velentzas argued to the jury that the government's main witness, Peter "Fat Pete" Chiodo, murdered Nalo.) Velentzas argues that the statement was not hearsay, and that it should have been admitted under Fed. R. Evid. 803(3), the state of mind exception to the hearsay rule. We disagree. As Velentzas notes, in a case such as this one, these two theories of

admissibility converge, and we address them together below. See United States v. Southland Corp., 760 F.2d 1366, 1376 (2d Cir.), cert. denied, 474 U.S. 825 (1985).

Rule 803(3) specifically excludes "a statement of memory or belief to prove the fact remembered or believed." It is therefore clear, as Velentzas acknowledges, that Velentzas could not have introduced Ferro's testimony to prove that Chiodo did kill Nalo. Velentzas strenuously maintains, however, that he does not seek to introduce the statement to prove that Chiodo killed Nalo, but rather only to show that Nalo knew Chiodo, a fact that Chiodo denied in his testimony, and that Chiodo had a motive to kill Nalo. If this is so, however, the evidence is relevant only insofar as it contradicts Chiodo's testimony and incrementally increases the chances of Chiodo being Nalo's murderer by

demonstrating that the two knew one another. Ferro's statement is not very probative of either point, however, because, even assuming that the statement was a reference to Chiodo, it does not clearly reflect that Nalo knew anything about Chiodo other than that he was overweight and of Italian descent. The resultant prejudice from admitting such a statement is substantial, however. Statements admissible under Rule 803(3) remain subject to a Rule 403 analysis, see United States v. Kennedy, 291 F.2d 457, 459 (2d Cir. 1961), and this statement fails the Rule 403 analysis. Cf. Shepard v. United States, 290 U.S. 96, 106 (1933) (theory of admissibility a "filament too fine to be disentangled by a jury"). Therefore, even assuming that if the proffered statement was offered solely for the purposes Velentzas proposes it falls within the state of mind exception to the

hearsay rule, it was not an abuse of discretion to exclude it under Rule 403.

Velentzas also briefly argues that the statement should be admitted under the catch-all exception to the hearsay rule contained in Fed. R. Evid. 803(24). However, Ferro's proposed testimony contains no particular, unusual indicia of reliability to warrant its admission under this exception. Indeed, it is not clear that the statement was even a reference to Chiodo.

III. Appeal of Peter Drakoulis

Peter Drakoulis was convicted of seven counts: a substantive RICO offense in violation of 18 U.S.C. § 1962(c), conspiracy to commit a RICO offense in violation of 18 U.S.C. § 1962(d), conspiracy to collect unlawful debts in violation of 18 U.S.C. § 1962(d), conducting an illegal gambling business in violation of 18 U.S.C. § 1955, conspiracy

to make extortionate extensions of credit in violation of 18 U.S.C. § 892, conspiracy to use extortionate means to collect and attempt to collect extensions of credit in violation of 18 U.S.C. § 894, and conspiracy to defraud the United States in violation of 18 U.S.C. § 371. He was sentenced principally to 63 months imprisonment. Although represented by counsel at trial, he appeals pro se, raising six issues.

A. Sufficiency of the Evidence

Drakoulis claims the evidence was legally insufficient to convict him of conspiracy to make and collect extensions of credit by extortionate means, and of conspiracy to defraud the United States (counts 8, 9, and 13). As to the loansharking conspiracy counts, there is evidence that Drakoulis frequently made loans to players in the barbut games and had players referred to him for loans by

Velentzas and others. He also made statements to his debtors that could reasonably be interpreted by the jury as threats. Therefore, there was sufficient evidence of Drakoulis's conspiring to use extortionate means to make and collect unlawful loans.

Likewise, the evidence was sufficient to establish that Drakoulis and the other members of the Velentzas crime group conspired to defraud the United States. The organization kept no records of its gambling operations, paid workers in cash, and failed to withhold tax from worker's salaries. Moreover, the members of the organization failed to declare income from their illegal gambling activities for a number of years.

B. Jury Charge on Reasonable Doubt

Drakoulis claims that the jury instruction on reasonable doubt was "fuzzy." Drakoulis, however, did not

object to the charge below, and the charge did not dilute the government's burden as expressed in the model instruction in 1 Edward J. Devitt, et al. Federal Jury Practice and Instructions § 12.10 (4th ed. 1992), that we have endorsed. See United States v. Delibac, 925 F.2d 610, 614 (2d Cir. 1991) (collecting cases). We therefore see no plain error, if error at all, in the instruction on reasonable doubt.

C. Jury Charge on Intent

Drakoulis claims that the jury instructions on the necessary intent for the loansharking conspiracy and conspiracy to defraud counts were improper. Again, however, Drakoulis did not object to these instructions at trial. Moreover, jury instructions on these counts and the instruction defining "knowingly" and "willfully," the requisite intent for these counts, substantially conformed to

the approved instructions in 2 Edward J. Devitt et al., supra, §§ 28.03, 34.03, 34.08, and 1 id. §§ 17.04, 17.05.

D. Jury Charge on Elements of Loansharking

Drakoulis claims that the jury instructions on the loansharking conspiracy counts (counts 8 and 9) were erroneous in failing to require the jury to find that "both sides . . . received something in the extortion deal." In support of this argument, Drakoulis invokes United States v. Garcia, 992 F.2d 409, 415 (2d Cir. 1993) (jury in Hobbs Act case must be instructed that the public official obtained a payment for official acts). However, unlike extortion, there is no similar requirement of a quid pro quo in the loansharking offenses of which Drakoulis was convicted.

E. Calculation of Tax Loss at Sentencing

Drakoulis next challenges the calculation of his offense level at 26 under the United States Sentencing Guidelines. Specifically, Drakoulis maintains that the amount of tax loss attributed to him was unreasonable.

The Guidelines specifically envision that sentencing courts in tax evasion cases will make a "reasonable estimate based on the available facts" of the amount of tax loss in cases where the exact loss is uncertain. U.S.S.G. § 2T1.1, comment. (n.2). Moreover, in determining an offense level at sentencing, a conspirator is liable for all the reasonably foreseeable acts of co-conspirators in furtherance of the conspiracy. U.S.S.G. § 1B1.3(a)(1)(B).

At sentencing, the district court based its calculation of the amount of tax

loss on records seized from only the two horse betting parlors of which Orkopoulos testified Drakoulis was a partner. The records from these locations alone showed a four-year tax loss of close to $4,000,000. The amount attributed to Drakoulis was therefore a conservative estimate of how much tax loss occurred. In any case, under the tax table and the multiple count grouping rules, Drakoulis could not lower his offense level without showing that the tax loss was under $350,000. At sentencing, Drakoulis's attorney conceded that he could not prove the loss was less than $350,000, describing that figure as "reasonable."

F. Denial of Acceptance of Responsibility

Drakoulis argues that he should have been given an acceptance of responsibility adjustment under section 3E1.1 of the Guidelines for his rehabilitative efforts,

and that the Sentencing Commission's decision to not grant retroactive effect to the amendment permitting a three-level adjustment for acceptance of responsibility was beyond the Commission's authority under the Guidelines' authorizing statute.

Judge Hurley clearly stated that he did not think Drakoulis deserved the acceptance of responsibility adjustment. Drakoulis maintained his innocence throughout the trial, and bases his claim for the adjustment solely on his laconic expression of remorse at the sentencing hearing and his contention on appeal that he has participated in rehabilitative programs. Judge Hurley believed that these factors did not merit the acceptance of responsibility adjustment. This conclusion was not clearly erroneous. United States v. Friedman, 998 F.2d 53, 60 (2d Cir. 1993); U.S.S.G. § 3E1.1, comment.

(n.5). Because we conclude that Drakoulis did not merit the two-level acceptance of responsibility adjustment, he is not qualified for the three-level adjustment. U.S.S.G. § 3E1.1(b) (1992). We therefore do not need to reach the question of the retroactivity of the Guidelines' amendment allowing a three-level adjustment for acceptance of responsibility.

Hon. Wilfred Feinberg, U.S.C.J.

Hon. Ralph K. Winter, U.S.C.J.

Hon. George C. Pratt, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

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